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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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THE PEOPLE,

Plaintiff and Respondent,

v.

SHELTON LESTER DUNSON,

Defendant and Appellant.

C060396

(Super. Ct. No. 62-076699)

Defendant Shelton Lester Dunson entered a negotiated plea of no contest to being a convicted felon in possession of a firearm and in possession of ammunition, and admitted having a prior conviction for a serious felony (Pen. Code, §§ 12021, subd. (a)(1), 12316, subd. (b)(1), 667, subds. (b) & (d), respectively [undesigned section references will be to this code].) The prosecutor moved to dismiss the remainder of the charges. The sentence was left entirely to the court's discretion, with defendant reserving the right to request that

the court exercise its discretion to dismiss the recidivist allegation.

At the sentencing hearing, the court denied the request to strike the recidivist allegation. After a discussion with the prosecutor about whether consecutive sentencing was mandatory, the court imposed a sentence of a doubled lower term on the gun conviction and a consecutive doubled subordinate term for the ammunition conviction. Defense counsel did not object to the sentence.

On appeal, defendant contends the trial court did not make an informed exercise of its discretion in sentencing him to consecutive terms, and therefore, it failed to give adequate reasons to support its sentencing choice. We shall affirm.

#### FACTS

The parties stipulated that the police report contained the factual basis for the plea. According to the summary contained in the probation report, the police made a January 2008 traffic stop of a car in which defendant was a passenger. After learning that defendant had an outstanding warrant, they arrested him and transported him to jail. On his arrival at the jail, defendant admitted that he had a fully loaded gun concealed in one shoe and 10 rounds of ammunition in the other. He claimed that he had found the gun from the home "inside an

unknown female's home"<sup>1</sup> and was carrying it for protection because he had been the victim a month earlier of a shooting and he was afraid for his safety. His prior conviction was for attempted robbery in 2005.

The probation report recommended concurrent terms because the crimes "were similar in nature and occurred during a single period of aberrant behavior." (See Cal. Rules of Court, rule 4.425(a) [subsequent rule citations are to this source].) It recommended a doubled middle term of four years for the primary offense. In its opposition to defendant's request to strike the recidivist finding, the prosecutor took issue with this recommendation, noting that section 654 did not prevent the court from sentencing defendant on both counts and arguing that the court should impose consecutive terms.

At the sentencing hearing, the trial court discussed the circumstances of the present offenses in connection with the request to strike the recidivist allegation. It believed that they showed defendant "was ready to engage in a gun fight if the need arose. A gun fight in public in case the need arose. [¶] This is not the old west. [¶] The recency of the [attempted robbery conviction], the fact that [defendant] was engaged in what I consider to be extremely dangerous activity, activity dangerous to members of the public, I am going to deny the

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<sup>1</sup> The gun was among items stolen in a December 2005 residential burglary.

[request to strike]." The court then invited comment on the proposed sentence of four years.

The prosecutor contended that "a concurrent term for the subordinate term . . . would be illegal. . . ." (See § 667, subd. (c)(6).) The trial court disagreed: "I think [under] the circumstances of this case, I could impose a concurrent sentence given the fact that the offenses were committed at the same time. They are actually connected [in th]at the ammunition [was] for the gun. [¶] There is no temporal or spatial separation between the commission of the offenses. In most instances I have to sentence consecutively in a three strikes case or a strike." The court also noted that the criteria were somewhat "broader" than those under section 654. (E.g., *People v. Deloza* (1998) 18 Cal.4th 585, 588, 595-596 (*Deloza*).) The court also suggested it could reach the same result if it imposed a doubled lower term for the primary offense with a consecutive one-third the midterm for the subordinate offense. The prosecutor asserted that the offenses "are not so intimately connected" because the ammunition was sufficient for an additional two reloads of the gun. The trial court responded, "So I solved the problem for myself. [¶] . . . [¶] Okay. You convinced me." Defense counsel expressed concern only about the calculation of custody credits, and did not object to the court's impending imposition of the sentence. The court did not state any other reason for selecting consecutive terms.

## DISCUSSION

Having failed to object at the time of sentencing to the court's failure to articulate reasons for imposing the consecutive sentences, defendant has forfeited the issue on appeal. There was an adequate opportunity to object before the actual imposition of sentence. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752; *People v. Scott* (1994) 9 Cal.4th 331, 354, 356.) As defendant argues this was ineffective assistance of counsel because it is a breach of professional duty to ignore sentencing error (e.g., *People v. Vattelli* (1971) 15 Cal.App.3d 54, 62), we will reach the issue.

When a defendant has a prior conviction for a serious felony within the meaning of section 667, subdivisions (b) and (d), consecutive sentences are mandatory for the current offenses unless they were "committed on the same occasion" or arose "from the same set of operative facts." (*Id.*, subd. (c)(6); *People v. Casper* (2004) 33 Cal.4th 38, 42.) They occur on the same occasion where (as the trial court correctly noted) there is a close temporal or spatial proximity between them. (*Deloza, supra*, 18 Cal.4th at pp. 595-596.) If so, then it is immaterial whether or not they also arise from common operative facts. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 139.)

We are not entirely certain of the train of reasoning of either the trial court or the prosecutor. Initially, the trial court correctly noted that the possession offenses were in close temporal and spatial proximity at the time of defendant's

arrest: there is an absence of any evidence of a possession of either item of contraband antecedent to or separate from the other. Since the evidence shows only that the offenses occurred on the same occasion, we do not see how the prosecutor's argument about the ammunition being in an amount well in excess of what was necessary for immediate use of the gun was even relevant to the same-occasion analysis or could have "convinced" the court of anything in that respect. It would have been relevant at best only to an absence of common operative facts, which is a moot point in light of the offenses occurring on the same occasion. On the other hand, the prosecutor's arguments may simply have been a successful effort to convince the trial court to impose consecutive sentences in its *discretion*.<sup>2</sup>

On the undisputed facts, the offenses occurred on the same occasion. This left the court with discretion to choose between consecutive and concurrent terms. (§ 667, subd. (c)(6).) If the trial court erroneously believed to the contrary, and for *that* reason failed to give any reasons in connection with its actual imposition of consecutive terms, this would not have been an informed exercise of its discretion, as the defendant argues. (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) However, it is also possible that the trial court was fully aware of its

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<sup>2</sup> The court's musings about reaching the same sentencing *result* with either concurrent or consecutive terms are tenebrous about the *route* the court was choosing to get there.

discretion, and believed its earlier remarks were sufficient to support its sentencing choice.

In either event, the error was manifestly harmless. There are numerous aggravating factors in the probation report: the crimes occurred while defendant was on probation, they represented his second and third felony convictions by the age of 21, the concealment of the contraband on his person showed planning and sophistication, defendant had other probation violations, and (in connection with his unsuitability for probation) the circumstances of the crime suggested he would be a danger to others. The only counterbalancing factors were defendant's youth, his participation in a treatment program as a peer counselor, and his volunteering the information about the presence of the gun and ammunition before processing at the jail.<sup>3</sup> Furthermore, the trial court expressed its foremost concern at the sentencing hearing about defendant's admitted willingness to engage in the "extremely dangerous activity" of public gunplay even if it were for his own protection. This is a general aggravating circumstance (rule 4.421(a)(1)) that could support the decision to impose consecutive sentences of itself even without the rest (rule 4.425(b)).

As a result, we do not see any possibility that the trial court might impose a lower principal term with a concurrent

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<sup>3</sup> This is a dubious mitigating factor at best, given that the jail personnel would imminently have found the contraband in the booking process.

subordinate term on remand even if it *had* misunderstood its discretion, and a remand otherwise for the statement of reasons that defendant demands would be a truly idle course of action. (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) His claim of ineffective assistance of trial counsel must fail as well. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

DISPOSITION

The judgment is affirmed.

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BLEASE, J.

I concur:

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ROBIE, J.

I concur in the result:

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SCOTLAND, P. J.